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In the Supreme Court of the United States

OCTOBER TERM, 1992

ATLANTIC RICHFIELD COMPANY, PETITIONER

v.

UNITED STATES DEPARTMENT OF ENERGY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Department of Energy abused its discretion in denying petitioner's 1989 application for retroactive reallocation of certain increased crude oil costs, incurred from 1973 through 1975, to reduce petitioner's liability in private litigation over alleged overcharges.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 977 F.2d 611. The opinion of the district court (Pet. App. 12a-27a) is reported at 772 F. Supp. 654.

JURISDICTION

The judgment of the court of appeals was entered on August 27, 1992. A petition for rehearing was denied on October 6, 1992. Pet. App. 62a. The petition for a writ of certiorari was filed on November 5, 1992. The jurisdiction of this Court is invoked under Section 211(g) of the Economic Stabilization Act of 1970, as amended, 85 Stat. 750, and 28 U.S.C. 1254(1).

STATEMENT

1. Under the Economic Stabilization Act of 1970 (ESA), as amended, 85 Stat. 744-753 (1971), and regulations issued thereunder, all products refined from crude oil were subject to price controls. The applicable regulations permitted oil refiners, such as petitioner, to incorporate their increased crude oil costs into the maximum permissible prices they could charge for products subject to price controls, using a volume-based formula known as the "V factor." Pet. App. 2a. The V factor was used to allocate allowable crude oil cost increases among various refined products, and was derived by dividing the volume of a given covered product sold during the relevant period by the total volume of all covered products sold during that period. *Ibid.* Refiners could pass increased costs through in the price of a covered product during a given month, using the amount calculated under this formula, or they could "bank" the allowable cost increases for pass-through in subsequent months. *Ibid.*

The ESA expired on April 30, 1974, and was superseded for present purposes by the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. 751 *et seq.* (1982) (EPAA). See Pet. App. 2a. Certain refinery by-products subject to price controls under the ESA were to be decontrolled under the EPAA. *Ibid.* Shortly before the ESA expired, the Department of Energy concluded that its existing regulations would permit refiners to allocate their total increased crude oil costs (including those associated with the newly decontrolled by-products) to products still subject to price controls. Pet. App. 2a-3a. In an effort to prevent

this result, the Department promulgated an emergency amendment to the regulations on April 30, 1974, without notice or comment, requiring that refiners include the volume of all products, including the newly decontrolled products, in the denominator of the V factor fraction. 39 Fed. Reg. 15,139 (1974); see Pet. App. 3a.

Certain refiners, including Mobil Oil Corporation, subsequently challenged the validity of the amended regulations or requested administrative exceptions. In a series of cases, the Temporary Emergency Court of Appeals determined that the April 30, 1974, amendment to the allocation formula was procedurally and substantively invalid and that Mobil was entitled to reallocate its costs in accordance with the unamended formula. *Mobil Oil Corp.* v. *Department of Energy*, 610 F.2d 796 (Temp. Emer. Ct. App. 1979), cert. denied, 446 U.S. 937 (1980) (*Mobil I*); *Mobil Oil Corp.* v. *Department of Energy*, 647 F.2d 142 (Temp. Emer. Ct. App. 1981) (*Mobil II*); *Mobil Oil Corp.* v. *Department of Energy*, 678 F.2d 1083 (Temp. Emer. Ct. App. 1982) (*Mobil III*). Pet. App. 3a. Beginning in 1976, the V factor (as amended) was first supplemented and then replaced with a different cost allocation formula, the validity and effect of which are not at issue here. See *Mobil III*, 678 F.2d at 1085.

The EPAA regulations required petroleum refiners like petitioner to file monthly cost allocation reports with the Department of Energy. See 10 C.F.R. 212.126(b) (1975). Petitioner filed such reports for the period in question, using the amended V factor formula in calculating its increased cost allocations. Pet. App. 3a. In March 1979, the Department of

Energy issued a final regulation limiting the time within which it would "routinely" accept revised and resubmitted cost allocation reports. 44 Fed. Reg. 14,536; 10 C.F.R. 212.126(d). The regulation provided a further grace period (until June 1, 1979) for refiling reports covering periods beginning in or after September 1973. After that time, refilings would be accepted only where expressly authorized by regulation or order, or where the Department granted "written permission to resubmit or refile for good cause shown." 10 C.F.R. 212.126(d)(2). As the court of appeals noted, Pet. App. 4a, the regulation specifically provides that the Department "will not make a finding of good cause routinely." Although it does not limit the Department's discretion in determining whether good cause has been shown, the regulation does provide specifically that

> Where it appears that such a finding [of good cause] may adversely affect the interest of the consuming public, a firm must demonstrate in its application, at a minimum, that the claimed errors or omissions in the report or reports which the firm seeks to replace or modify did not result from a failure to exercise due care or diligence.

10 C.F.R. 212.126(d)(3).

In March and April 1980 and August 1981, petitioner requested that the Department of Energy permit it to refile various cost allocation reports, using the unamended V factor formula. The Department rejected each of these requests as premature pending final resolution of the *Mobil* litigation. In March 1982 (before the decision in *Mobil III*), petitioner again requested permission to refile; this time

the Department did not respond. Shortly thereafter, negotiations began that resulted in the settlement, in 1985, of essentially all price control compliance issues between petitioner and the Department. Pet. App. 4a, 33a.

2. In 1979, a group of petitioner's wholesale customers (intervenor-respondents here) filed suit alleging that petitioner had overcharged them for price-controlled products. Pet. App. 4a. See *Van Vranken* v. *Atlantic Richfield Co.*, 699 F. Supp. 1420 (N.D. Cal. 1988). In a summary judgment motion filed in 1988, petitioner argued that, under the *Mobil* cases, it had the right to reallocate its costs retroactively using the unamended V factor formula, thus increasing the costs allocable to covered products and offsetting any overcharge liability to the *Van Vranken* plaintiffs. Pet. App. 5a. The district court rejected petitioner's argument, holding that the *Mobil* decisions did not automatically allow petitioner to reallocate its costs. *Ibid.*

The court of appeals affirmed, holding that the *Mobil* cases neither required nor permitted petitioner to reallocate its costs retroactively without complying with the Department's discretionary refiling regulation. *Van Vranken* v. *Atlantic Richfield Co.*, 890 F.2d 421 (Temp. Emer. Ct. App. 1989), cert. denied, 494 U.S. 1005 (1990). See Pet. App. 5a. As the court below in this case described its prior reasoning in *Van Vranken*, petitioner was not *required* to reallocate its costs because there was nothing illegal about having claimed less than the maximum permissible cost increase by using the amended V factor formula. *Ibid.* Petitioner was not *permitted*

to reallocate its costs because it had not complied with the applicable regulations and obtained the Department's permission to refile its cost reports. *Ibid.* Moreover, the court held that petitioner had waived any right to judicial relief by failing to challenge the validity of the V factor amendment in a timely manner. *Ibid.*

3. a. After the court of appeals' decision in *Van Vranken*, petitioner submitted a new application with the Department requesting permission to refile its cost allocation reports for the months August 1973 through December 1975 using the unamended V factor formula. Pet. App. 5a, 28a. When the Department did not respond within 90 days, see 10 C.F.R. 205.96, petitioner appealed to the Department's Office of Hearings and Appeals (OHA). Pet. App. 5a, 28a. In February 1991, the OHA issued an opinion upholding denial of petitioner's application to refile. *Ibid.* Relying largely on the court of appeals' opinion in *Van Vranken*, the OHA concluded that the *Mobil* decisions and other factors cited by petitioner did not constitute "good cause" for the refiling under 10 C.F.R. 212.126(d)(2). Pet. App. 5a, 48a-57a. Alternatively, the OHA determined that petitioner had failed to satisfy the "due care and diligence" provision of the regulation. Pet. App. 5a, 57a-61a; 10 C.F.R. 212.126(d)(3).

b. Petitioner challenged the OHA's decision in the United States District Court for the District of Columbia, beginning the present litigation. In rejecting petitioner's good cause arguments, that court held that the OHA had "properly interpreted and applied the holding of *Van Vranken*" and the De-

partment's regulations, had acted rationally, and had made no clear error of judgment. Pet. App. 21a. The court further held that the OHA's interpretation of the "due care and diligence" requirement of the refiling regulation was both entitled to deference and substantively correct. Pet. App. 21a-27a.

c. On appeal, petitioner renewed its good cause and "due diligence" arguments. See Pet. C.A. Br. 12-25. Petitioner also argued for the first time that "principles of equality * * * and *stare decisis*" articulated by this Court in *James B. Beam Distilling Co.* v. *Georgia*, 111 S. Ct. 2439 (1991), required reversal so that petitioner could enjoy the benefit of the *Mobil* decisions invalidating the amended V factor regulations. Pet. C.A. Br. 14.

The court of appeals rejected petitioner's arguments. The court observed that *Beam* involved this Court's announcement of a new constitutional rule, that the scope of its holding was not yet clear, and that the members of this Court who joined in the decision "differed greatly in their rationale[s] for the judgment." Pet. App. 7a-8a. The court concluded, however, that it was unnecessary to address any of those issues in detail, because even if the *Beam* retroactivity principle applied to this case, it would not entitle petitioner to reallocate its costs without obtaining permission in accordance with the Department's regulations. Pet. App. 8a-9a.

The court noted that *Beam* distinguished carefully between the determination of what rule of law was applicable to litigants generally, and what remedies would be available to litigants in particular cases. Pet. App. 8a (citing, *inter alia*, 111 S. Ct. at 2448

(remanding case and making clear that respondent remained free to raise "procedural bars to recovery" or other arguments affecting availability of relief in the particular case)). The court then reiterated that because petitioner's cost allocations as originally filed were permissible under either the amended V factor formula invalidated in *Mobil I* or under the original formula, there was "no *requirement* that the cost allocations be changed." Pet. App. 9a. Thus, the court viewed the question on appeal as the same as that presented to the OHA and to the district court: "whether [petitioner] has established sufficient good cause for [the Department] to grant special permission for the refiling" under the applicable regulations. *Ibid.*

As the court observed, that question lies "within the discretion of [the Department]." Pet. App. 9a. In light of the court's previous decision in *Van Vranken*, petitioner's admission that "the only impact of the refilings would be in determining its potential liability" to the *Van Vranken* plaintiffs, and "other cases * * * which 'uniformly hold that where the original cost allocation was permissible but not required, retroactive recalculation should not be allowed to offset overcharges which [arose] as a result of unrelated regulatory violations,' " the court held flatly that "the OHA and [the] district court correctly concluded that no good cause exists to allow [petitioner's] belated refiling." Pet. App. 9a-10a, quoting *Chevron U.S.A. Inc.* v. *Department of Energy*, 944 F.2d 914, 917 (Temp. Emer. Ct. App. 1991).

ARGUMENT

Petitioner contends that this Court's decision in *James B. Beam Distilling Co.* v. *Georgia*, *supra*, requires that the court of appeals grant petitioner the benefit of that court's prior decision in *Mobil I*, invalidating the amended V factor formula. As the court of appeals correctly recognized, however, this case does not turn on the application of *Beam* to invalidated agency regulations, nor does it involve a dispute over basic principles of retroactivity. See Pet. App. 6a-8a. Indeed, the court of appeals assumed that the unamended V factor formula reinstated by *Mobil I* would supply the rule of law governing petitioner's cost allocations for the period in question. Pet. App. 9a. The question instead is whether petitioner, in its quest to obtain the benefit of *Mobil I*, has satisfied the Department of Energy's separate regulatory requirements for amending a valid, previously filed cost allocation.[1] *Ibid.*

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[1] Petitioner is similarly mistaken in suggesting that the court of appeals' decision conflicts with *United States* v. *Goodner Bros. Aircraft, Inc.*, 966 F.2d 380 (8th Cir. 1992), cert. denied, No. 92-607 (Jan. 11, 1993). In that case, the Eighth Circuit cited *Beam* in reversing various criminal convictions that were potentially predicated on an invalid Environmental Protection Agency regulation. In this case, by contrast, petitioner is not charged with having violated a voided regulation. As the court of appeals has specifically (and repeatedly) found, there was nothing illegal or improper about petitioner's cost allocations under either the amended or the unamended formula. Pet. App. 9a; *Van Vranken*, 890 F.2d at 423. As discussed in the text, petitioner simply seeks to benefit from a change in formulas without having satisfied the necessary procedural requirements. See Pet. App. 9a.

As petitioner concedes, a new rule of federal law is applied to similarly situated parties "whose claims are not otherwise barred by procedural requirements or *res judicata*." Pet. 2, citing *Beam*, 111 S. Ct. at 2448. This case involves precisely the sort of "procedural requiremen[t]" that *Beam* expressly recognized as a potential bar to recovery by a litigant in a particular case. Under the Department of Energy's regulations, any refiner wishing to amend and refile a cost allocation report more than one year after its original filing must obtain written permission from the Department of Energy "for good cause shown." 10 C.F.R. 212.126(d)(2). Moreover, the Department "will not make a finding of good cause routinely," and where such a finding might adversely affect the interest of the consuming public, the applicant must "at a minimum" demonstrate that it has exercised "due care and diligence." Petitioner does not challenge the validity or applicability of these obviously reasonable procedural rules, which operate in the nature of a statute of limitations.[2]

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[2] For the same reason, petitioner's complaint that the decision below "eviscerate[s] this Court's prohibition of selective prospectivity" by denying petitioner "*any* remedy" in this case, Pet. 14, is misconceived. A party whose request for relief is barred by an applicable statute of limitations or some other valid procedural condition precedent to the relief sought is not the victim of impermissible "selective prospectivity." It is a routine consequence of all rules of finality and repose that some potential litigants will have no opportunity to benefit even from "fully retroactive" decisions. See, *e.g.*, *Beam*, 111 S. Ct. at 2443 (fully retroactive decision applies to all parties "by and against whom claims may be pressed, consistent with res judicata and procedural barriers such as statutes of limitations").

Thus, as the court of appeals recognized, Pet. App. 9a, despite petitioner's emphasis on *Beam*, the issue in this case remains what it has always been: whether or not the Department abused its considerable discretion in finding that petitioner has not established "good cause" for refiling its cost reports under the circumstances of this case. As discussed above, the OHA, the district court, and the court of appeals have all found squarely in favor of the Department on that issue. See pages 6-8, *supra*. Indeed, all three have also found that the specific "due care or diligence" standard applies to petitioner's application in this case and that the Department was correct in concluding that petitioner had not met that standard. *Ibid.*

The only issue this case presents—whether the agency properly applied a valid procedural rule to particular facts—has been carefully addressed and properly resolved in the various proceedings below. Its resolution affects only petitioner and the intervenor respondents in this case, and presents no question of broad importance warranting this Court's review. See, *e.g.*, *Dobbs* v. *Zant*, No. 92-5579 (Jan. 19, 1993) (Scalia, J., concurring in the judgment). As the court of appeals noted, petitioner has "admitted that the only impact of the refilings would be in determining its potential liability in *Van Vranken*." Pet. App. 9a. Indeed, in its brief in the court of appeals, Pet. C.A. Br. 1, petitioner assured the court that

> [t]he Court's decision in this case will not affect any ongoing [Department of Energy] regulatory program. It will not affect consumers through price increases or otherwise. Rather, the sole

> impact will be the extent to which a class of wholesale-purchaser resellers may assert liability against [petitioner] in a 1979 private overcharge suit still pending in California.

We concur in that assessment of the significance of the issue presented.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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